No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

STANDARD RICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

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OPINION BELOW

The opinion of the court below (R. 37–41) is reported in 53 F. Supp. 717.

JURISDICTION

The judgment of the Court of Claims was entered on February 7, 1944 (R. 41). The petition for a writ of certiorari was filed on April 28, 1944, and was granted on June 12, 1944 (R. 42). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 18, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

In November 1935, respondent agreed to sell rice to the United States under a contract which

provided that prices paid included any federal tax theretofore imposed by Congress which was applicable to the material involved and that any tax "which may hereafter [the date set for the opening of this bid] be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." The federal processing tax on rice had become effective in April 1935. The United States paid respondent the full contract price on the rice delivered, but respondent did not pay any processing tax on the rice, due to the fact that the Agricultural Adjustment Act was declared unconstitutional.

The questions involved are: (1) Whether the Government is entitled to an offset against an overpayment of income taxes for a reduction in the contract prices equal to the amount of unpaid processing taxes, or (2) whether, upon the theory of money paid by mutual mistake, it may offset a sum equal to the unpaid processing tax, less in either case the increase in the unjust enrichment tax attributable to the inclusion of the transactions.

STATUTES INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United

States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U. S. C. Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that * * * in the case of rice * * * the processing tax shall be in effect on and after April 1, 1935. * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the

date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture; * * *.
(7 U. S. C. Sec. 609.)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means * * * rice, * * *, and any regional or market classification, type, or grade thereof; * * *.
(7 U. S. C. Sec. 611.)

STATEMENT

The special findings of fact of the Court of Claims (R. 33–37) may be summarized as follows:

On November 13, 1935, respondent, a corporation engaged in the business of milling rice for sale, entered into a contract with the United States under which respondent agreed to supply rice to the Navy Department at the bid prices

specified in the contract (R. 35). The contract contained the following provision (*ibid.*):

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

Under the terms of the contract, the respondent delivered to the United States 584,800 pounds of milled rice and received full payment from the United States in accordance with the terms of the contract (R. 35).

Respondent, as the first domestic processor of rice, paid the processing taxes imposed as of April 1, 1935, by the Agricultural Adjustment Act (*supra*, pp. 3–4) from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October 1935, respondent obtained an injunction against the Collector of Internal Revenue prohibiting the collection from it of any further processing taxes. Respondent did not pay to the United States processing taxes on the supplies furnished to the United States under the contract here involved, such taxes amounting to $8,479.60. (R. 35.)

The Comptroller General, on behalf of the United States, asserted a claim against respondent for the above amount of $8,479.60 on the theory that there had been an overpayment by the United States on the contract, since respondent had failed to pay the processing tax on the rice delivered under the contract (R. 35–36). Overassessments of income tax were determined in favor of the respondent for the fiscal years ending July 31, 1935, and July 31, 1938. Of these overpayments, the amount of $8,479.60 was not refunded to respondent but was credited by the Comptroller General against the claim of the United States. (R. 34, 36–37.)

Respondent paid to the Collector of Internal Revenue for the First Texas District an unjust enrichment tax of $72,072.30 on account of its having been relieved of the payment of the processing taxes. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the unjust enrichment tax would have been reduced by the amount of $1,706.59. (R. 37.)[1]

[1] The Government conceded in the court below that, as pointed out in *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, 216, note 6, if respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions. See Sections 501 (b) (2) and (j) (4) of the Revenue Act of 1936 (26 U. S. C. Sec. 700 (b) (2) and (j) (4)).

After the refusal of the Comptroller General to refund the amount of $8,479.60, this suit was brought in the Court of Claims; and that court, on Febuary 7, 1944, entered judgment in favor of the respondent for $8,479.60, with interest (R. 41).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due for overpayments of taxes, amounts paid to respondent under the contract in reimbursement for processing taxes which the respondent never paid.

2. In failing and refusing to hold that the contract provision that the price included taxes then in effect contemplated that the vendor would pay the processing taxes to the Government.

3. In failing to enter judgment for the United States.

SUMMARY OF ARGUMENT

A. The Government and the respondent agreed in the contract here involved that the prices included federal taxes theretofore imposed. Both parties assumed that the processing tax would be collectible and intended that the price should *pro tanto* be offset by the tax. The respondent did not pay the processing tax but collected the full amount of the contract price from the Govern-

ment. The Government is, therefore, entitled under the contract to recover the amount of the unpaid processing tax and is not required to refund so much of the respondent's overpayment of income taxes as equals such sum. It is true that in such a contract between private parties the vendee is usually not allowed to recover. However, this Court has held that this rule is not applicable when the Government is one of the parties to the contract. *United States* v. *Kansas Flour Corp.*, 314 U. S. 212. There is no difference between the purpose of the contract in this case and that of the contract in the *Kansas Flour* case.

B. In the alternative, the Government, upon the equitable theory of a payment of money by mutual mistake, should be permitted to offset against the respondent's claim an amount equal to the unpaid processing taxes, less the increase in the unjust enrichment tax attributable to the inclusion of the transactions here involved. The respondent has been unjustly enriched to that extent. Money disbursed erroneously by public officers may be recovered whether the error is one of fact or law. The vendor should not be allowed to be unjustly enriched by retaining the full contract price when it did not pay the processing taxes included in that price. The respondent may recover only to the extent that it is in equity and good conscience entitled to a refund.

ARGUMENT

THE UNITED STATES IS ENTITLED TO WITHHOLD THE AMOUNT OF THE UNPAID PROCESSING TAX

A. Under the contract here involved, the respondent agreed to sell rice to the United States. The contract expressly provided that (R. 35):

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

At the time this contract was entered into, the Agricultural Adjustment Act imposed processing taxes on rice. This tax was clearly a federal tax applicable to the material covered by the bid (see *United States v. Glenn L. Martin Co.*, 308 U. S. 62); the Act did not exempt vendors to the United States from the processing tax; and a Treasury Regulation required that they pay the tax. Treasury Regulations 81, Article 9, under the Agricultural Adjustment Act. Moreover, the amount of the tax was known.[2]

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[2] The contract was executed on November 13, 1935 (R. 35). The tax was effective as of April 1, 1935, and was \$.01 per pound of rough rice (Section 9 (b) (3), 7 U. S. C. Sec. 609

It thus seems clear that both the United States and the respondent contemplated payment of the processing tax, and as specifically stated in the contract, fixed the price to include the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. The price was accordingly designed to offset *pro tanto* the amount of the tax. The conclusion is reinforced by the second sentence of the contract quoted above (p. 9) which required the United States to pay an amount equal to any additional excise, sales or other tax that might subsequently be imposed by Congress on the material applicable to the bid and required that such amount should be billed as a separate item. No processing tax, however, was paid on the rice covered by the contract because of the decision in *United States* v. *Butler*, 297 U. S. 1, holding the tax invalid, and because of the injunction the vendor secured prohibiting the collection of the processing tax; and there has in fact been no offset to the full contract price paid by the United States through the payment of the processing tax.

In *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, this Court held that under the contracts involved there, the United States could offset

(b) (3)), and the conversion factor of $.0145 per pound of milled or clean rice as the equivalent of the processing tax of $.01 per pound of rough rice had been established by regulations made pursuant to the Agricultural Adjustment Act (R. 36).

amounts it paid as part of the contract price[3] to cover processing taxes which were allegedly to be paid by the vendor but which the vendor had not paid. The court below declined to follow the *Kansas Flour* case. It held that in general the Government, as contractor, should be treated by the law as other contractors similarly circumstanced would be treated and regarded the *Kansas Flour* case as turning on the particular language of the contracts there involved. It emphasized that the contract here (*supra*, p. 9) did not use the phrase "processing tax" and that while providing for an increase in price due to the imposition of new excises, it did not contain a so-called "up and down" provision stating that if taxes were thereafter imposed or changed by Con-

[3] The tax clause of the contracts in the *Kansas Flour* case provided (314 U. S. at p. 213):

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

gress, then the prices named in the contract would be increased or decreased accordingly.

We do not construe the principle of the *Kansas Flour* case as being so limited. We understand that the Court held that if a contract between the vendor and the United States contemplates that the vendor will pay the processing tax and that the sale price is thus *pro tanto* offset by the amount of the tax, the Government is entitled to recover an amount equal to the tax when it is determined that the tax cannot be collected. It is true that the Court held that the recognition by Congress of the invalidation of the Agricultural Adjustment Act by the legislation embodied in the 1936 Revenue Act amounted to a "change by the Congress" within the meaning of the "up and down" clause and relied upon that clause, though not exclusively, in ascertaining the purpose and effect of the contract, but there is no intimation in the opinion that the same rule would not be applied where the same purpose to have the vendor pay the tax and be reimbursed *pro tanto* in the price is disclosed by other language. The respondents there had contended that the Government was not entitled to a setoff because the contracts contained no express undertaking that the vendor should pay the tax, and also had contended that a price adjustment was only required in case of a reduction of the tax by Congress as distinguished from its invalidation. They relied upon

decisions[4] holding that similar tax clauses in private contracts did not require an adjustment of the contract price as a result of the decision in *United States* v. *Butler,* 297 U. S. 1. However, the Court did not hold that there may be a departure from the rule applicable to similarly circumstanced private contractors only where the contract employs the language of the *Kansas Flour* contract. Rather, it was pointed out (314 U. S. at pp. 215–216) that those cases turned on the absence of an express provision respecting constitutional invalidity and upon the omission of the parties to provide for billing the tax separately, and it was held that such considerations are not applicable to Government contracts, where the purpose of the tax clause is different. The Court said (314 U. S. at pp. 216–217):

> In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the tax by injunction does not reduce the

[4] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. C. A. 10th); *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. 2d 898 (C. C. A. 7th); *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950 (D. Mont.); *G. S. Johnson Co.* v. *N. Sauer Milling Co.*, 148 Kan. 861; *Sparks Milling Co.* v. *Powell*, 283 Ky. 669; *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448.

price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers. In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage.[7] Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected.[8] The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

[7] In *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445, the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

[8] Compare *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 36–37.

The considerations which led the Court to allow recovery in the *Kansas Flour* case are applicable to any case in which the contract between the

vendor and the Government contemplates that the vendor will pay the tax and fixes the price to include the tax with a purpose to balance the tax element in the price paid with the tax collected. Such a purpose may be found in other language than the exact language employed in the contracts involved in the *Kansas Flour* case. It is not material that the tax clause here lacks an "up and down" provision. See *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694, and *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.) in both of which cases recovery was allowed to the Government. A petition for a writ of certiorari in the *American Packing Co.* case was not denied until after the *Kansas Flour* case was decided, and the decision was twice cited in the *Kansas Flour* opinion. The *American Packing Co.* case involved a number of contracts, some similar to the one here involved and others containing an "up and down clause," but no distinction was made between the two classes[5] in reach-

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[5] In its petition for certiorari in the *American Packing Co.* case (p. 5), the taxpayer referred this Court to the portion of the record [R. 27-29] in the Tenth Circuit containing the tax clauses involved.

In discussing the tax clauses, the Tenth Circuit remarked (122 F. 2d at p. 447):

> Each of the eighteen contracts contained what is commonly known as the Federal Tax Clause. Although all of the tax clauses are not identical in form and com-

ing the conclusion that recovery was allowable. The tax clause in the *Suncook Mills* case was identical in all material respects with the one here involved.

The purpose of the tax clause in all Government contracts dealing with commodities subject to processing tax is of necessity the same as the purpose of the tax clause in the *Kansas Flour* case. The parties here had the processing tax in mind, as the most obvious tax applicable to the material covered by the bid (cf. *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62); the price was stated to include any previously imposed federal tax applicable to the material; and provision was made for payment by the Government of any increased tax imposed. The amount of the tax was not buried in the composite price, for the amount was known (see p. 9, *supra*). The tax was to be paid to the United States as the tax collector, and the United States as a vendee not intending to

position, the variations contained therein are immaterial to our consideration of the question presented. In substance they all provide that the bid price is a composite price and includes all taxes applicable to the materials and supplies furnished under the contract, with the further proviso that any additional tax imposed after the opening of the bids would be added to the purchase price, and paid by the Government as a separate item. Some of the contracts contained a provision that any change in the existing taxes, applicable to and paid by the vendor would increase or decrease the purchase price accordingly; if changed upward, the increase was to be paid by the Government as a separate item.

resell could not pass on to any other person the amount of the tax included in the price. *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.). Hence, when the parties stated that the bid price included the amount of any federal tax applicable to the material included in the bid, the purpose of the arrangement was to provide the vendor a margin of profit over the processing tax to be paid. This Court thus construed a similar provision in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62. It is true that there the narrow question was whether taxes imposed by the Social Security Act, c. 531, 49 Stat. 620, were of the type for which the contract provided extra compensation. But in deciding that question, the Court was required to construe a federal tax clause in a Government contract, the first sentence of which is identical with the one here involved.[6] The Court there said (308 U. S. at p. 64):

> Obviously, the seller fixed its stipulated prices so as to provide a margin of profit

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[6] The tax clause in the *Glenn L. Martin Co.* case provided (308 U. S. at p. 63):

> It is expressly understood and agreed to by and between the parties hereto that the prices herein stipulated include any Federal Tax heretofore imposed by the Congress which is applicable to the material called for under the terms of this contract. If any sales tax, processing

over federal taxes for which it might at the time of the contract be responsible on the particular "material" sold. This clearly appears from the governing provision's opening declaration that "the prices herein stipulated include any Federal tax hereto-fore imposed by Congress which is applicable to the material called for under the terms of this contract." * * *

We maintain that this construction is controlling here, and since the purpose of the provision was to protect the vendor's margin of profit, the realization by it of a greater profit because of its failure to pay the taxes imposed by the Agricultural Adjustment Act was not contemplated by the parties when the contracts were executed. *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.). Under the contract, no advantage to either party attributable to the tax could arise since under the Agri-

tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacture, or sale of the supplies called for herein and are paid by the Contractor on the articles or supplies herein contracted for then the price herein stipulated will be increased or decreased accordingly and any amount due the Contractor or as result of such change will be charged to the Government and entered on vouchers as separate items.

cultural Adjustment Act and the contract the vendor was bound to pay the processing tax upon the rice furnished to the Government and the Government was bound to repay to the vendor the amount of such taxes. It was never the intention of the parties that the vendor should obtain any benefit from the taxes, and the vendor is not entitled under the contract to retain the full contract price including the unpaid processing tax.

The fact that the contract provided that the prices were to be increased by the amount of subsequently imposed taxes does not, as the court below thought (R. 41), signify any intention by the parties that the prices should not be decreased if the vendor did not pay taxes already imposed. On the contrary, the fair construction of the contract as a whole is that the vendor was to be reimbursed only for taxes which it was obligated to and did pay to the United States. Cf. *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 35, 36, where a similar clause[7] was construed as requiring the United States to make reimbursement for such taxes as the contractor paid pursuant to an obligation imposed upon him by a tax statute. Consequently, it is urged that the present contract should be construed as requiring the price to be adjusted

[7] This clause was like that involved in the *Glenn L. Martin* case. See fn. 6, *supra*.

according to whether or not the vendor paid the taxes envisaged in the contract.[8]

We recognize that the decisions in the *American Packing Co.* case and the *Suncook Mills* case were not based upon a contractual ground but upon the ground that the price had been fixed and paid on the basis of a mutual mistake and in equity and good conscience the Government was entitled to recover. However, both decisions recognized that the tax clauses involved had the same purpose as in the *Kansas Flour* case. We submit that those clauses and that involved here also had the same contractual effect as in the *Kansas Flour* case and that the Government's claim for recovery under the contract is valid here as in the *Kansas Flour* case. Assuming the validity of the Government's claim for the adjustment in price, there can be no question as to the authority of the Comptroller General to withhold *pro tanto* the amount of refund of income taxes due the respondent (Section 236 of the Revised Statutes, as amended by the Budget and Accounting Act of 1921, c. 18, 42 Stat. 20, 31 U. S. C. Sec. 71) or of the right to a setoff

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[8] Even as to private buyers, a promise of the seller to repay the amount of the tax to the buyer if not paid to the Government has been implied where the tax is billed separately. *Wayne County Produce Co.* v. *Duffy Mott Co.*, 244 N. Y. 351. See also Restatement of the Law, Restitution, Sec. 48. As previously pointed out (p. 13), the fact that the tax is not billed separately is of no significance in a Government contract. *United States* v. *Kansas Flour Corp.*, 314 U. S. 212.

in the Court of Claims under Section 146 of the Judicial Code (28 U. S. C. Sec. 252).

B. If the Court should hold that the contract itself did not expressly or impliedly provide for a price adjustment, we submit that a setoff should be allowed[9] under the equitable principles laid down in the *American Packing Co.* case and the *Suncook Mills* case. This alternative ground was urged in the Government's brief in the *Kansas Flour* case, but the Court had no occasion to consider the point.

For reasons previously stated (pp. 9–10, 14–19, *supra*), it is clear that the contract contemplated payment of the processing tax by the vendor, and as specifically stated in the contract, the parties fixed the price accordingly. If the parties had known that the respondent was not liable for and would not pay the tax, the contract price would have been reduced *pro tanto*. Thus, the contract was executed and payment made at a price which

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[9] The respondent apparently assumed in its brief in opposition (p. 11) that the Government relied entirely on the theory that it was entitled to an adjustment of price under the contract. There was no basis for such an assumption, for a direct conflict with *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied 314 U. S. 694, was asserted in the petition, whereas only a conflict in principle with *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, was alleged; furthermore, the petition (p. 8) expressly discusses the unjust enrichment, equitable argument. The specifications of error are broad enough to cover either theory, as was the presentation below.

reflected the mutual mistake of the parties. It is true that the mistake was one of law and not of fact, but it is well settled that moneys paid out by public officials may be recovered when the payments are based on a mistake of law. *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 211-212; *Allen* v. *United States*, 204 U. S. 581; *Sutton* v. *United States*, 256 U. S. 575; *United States* v. *Wurts*, 303 U. S. 414. See also *United States* v. *Saunders*, 79 Fed. 407 (C. C. A. 1st); *Leonard* v. *Gage*, 94 F. 2d 19, 24 (C. C. A. 4th), certiorari denied, 303 U. S. 653; *United States* v. *Bentley*, 107 F. 2d 382 (C. C. A. 2d); *Talcott* v. *United States*, 23 F. 2d 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604. The rule applies when the mistake is made in the execution or settlement of contracts of the United States. *Steele* v. *United States*, 113 U. S. 128; *United States* v. *Barlow*, 132 U. S. 271, 282; *Grand Trunk Wn. Ry. Co.* v. *United States*, 252 U. S. 112.

Even in the case of a private contract, recovery has been allowed to the buyer where the contract provided that the price included existing taxes and the tax was billed separately. *Wayne County Produce Co.* v. *Duffy Mott Co.*, 244 N. Y. 351. See also Restatement of the Law, Restitution, Sec. 48; and footnote 8, *supra*. But whether or not a private buyer would be entitled to recover is irrelevant here. As the Court stated in *United States* v. *Saunders*, 79 Fed. 407, 408 (C. C. A. 1st), there

is a "general right of the United States to recover moneys paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex aequo et bono.*" The rule is based on the distinction between public and private contracts, for the former are made by "public officers using the funds of the people" and the latter by "individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion." *Barnes* v. *District of Columbia,* 22 C. Cls. 366, 394, cited with approval in *Wisconsin Central R'd* v. *United States,* 164 U. S. 190, 212. Thus, when the United States is the buyer, public policy demands that an amount paid in the mistaken belief that the taxes attributable to the material would be paid should be recovered by the Government, for otherwise the vendor would be unjustly enriched by funds contributed by the taxpay~~ers~~ public.

The equitable principles applied by the courts in the *American Packing Co.* and *Suncook Mills* cases are equally applicable in this proceeding. In the *American Packing Co.* case, the Government asserted as an equitable defense to a suit on a contract that the vendor was indebted to it in the amount of unpaid processing taxes upon commodities for which the Government had paid in full under previous contracts. The Circuit Court of Appeals for the Tenth Circuit

held (122 F. 2d at p. 449) that under the Federal Rules of Civil Procedure (Rule 8 (e) (2)) and the law of Utah, where the suit was brought, the Government had the right to assert such an equitable set-off as a defense. It also held that to sustain an action for money had and received, it was sufficient to show that one party had obtained money "under such circumstances that in equity and good conscience it should be returned" to the other party (*ibid.*). In the *Suncook Mills* case, the court pointed out that the same rule prevailed under the law of Massachusetts applicable in that case. The present suit is one brought for the recovery of income taxes, and the taxpayer (respondent here) is not entitled to recover unless the Government holds money which *ex aequo et bono* belongs to the taxpayer. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 402–403; *Lewis* v. *Reynolds*, 48 F. 2d 515 (C. C. A. 10th), affirmed, 284 U. S. 281; see also *Bull* v. *United States*, 295 U. S. 247.

The respondent asserted that there has been no unjust enrichment or else that the unjust enrichment is limited to $341.34 because of the unjust enrichment tax imposed under Title III of the Revenue Act of 1936, c. 690, 49 Stat. 1648. In the *Kansas Flour* case, this Court pointed out that if the respondent were required to reduce its price by the amount of the unpaid processing tax, it would not be liable for the unjust enrichment tax. See Section 501 (b) (2) and (j) (4) of the Reve-

nue Act of 1936 (26 U. S. C. Sec. 700 (b) (2) and (j) (4)). We make the same concession here. In this case, however, the unjust enrichment tax has been paid. The amount by which it was increased as the result of the inclusion of the transactions here involved was $1,706.59 as contrasted with the unpaid processing taxes of $8,479.60. (See Statement, *supra*, pp. 5–6.) The difference is the amount which the Government is equitably entitled to retain.[10]

CONCLUSION

The decision of the court below should be reversed and recovery limited to $1,706.59.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
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[10] The respondent's contention in its brief in opposition (p. 14) that it was unjustly enriched only to the extent of 20% of $1,706.59 or $341.34 rather than to the extent of $8,479.60 less $1,706.59, is mistaken.

U. S. GOVERNMENT PRINTING OFFICE: 1944